SHELL MARKETING CO. OF BORNEO LTD.

v.

WEE BOON PING

HIGH COURT BORNEO, KOTA KINABALU
MOHD. NOOR AHMAD J
[CIVIL SUIT NO. K. 776 OF 1987]
21 JULY 1989

CIVIL PROCEDURE: *Order 14 - Delay in application - Whether reasons for delay reasonable - Order 18 r. 19 - Whether delay in making application fatal - Striking out of defence - Whether there were triable issues.*

CONTRACT: *Guarantee - Whether demand necessary - Construction of guarantee - Continuing guarantee - Whether liable for debts incurred before the date of the guarantee - Construction of guarantee - Should be given reasonable business meaning.*

Under a consumer contract between the plaintiff and one Haskota Engineering Sdn. Bhd., ("HE") the plaintiff agreed to supply certain goods on credit to HE and some other companies stated in the contract whereby the companies would make such orders and accept deliveries of these goods. The plaintiff would invoice these companies and address the same to HE for payment and HE would be liable to settle these invoices. At a time when HE was already indebted to the plaintiff, the defendant had agreed under a guarantee ("the guarantee") to be responsible to the plaintiff on demand for the due payments for these invoices not exceeding the sum of RM3 million.

The plaintiff did supply these goods to HE and the companies and HE fell into arrears of payment and the plaintiff made this claim against the defendant under the guarantee. The plaintiff filed an application to have the defendant's defence struck out under O. 18 r. 19 or for summary judgment under O. 14 of the Rules of the High Court.

The defendant contended that the following represented triable issues:

(1) whether there was a good notice of demand made to the defendant - whether the discrepancy in some of the demands and the claims herein made the demand improper;

(2) was there good consideration to support the guarantee or was it some past consideration (as part of the claim was in respect of debts before the guarantee);

(3) was the amount claimed incurred by HE;

(4) what was the actual amount, if any.

During the proceedings in chambers, the defendant made a preliminary objection in respect of the delay of 16 months on the part of the plaintiff in applying for judgment under O. 14. The plaintiff's reasons were as follows:

(1) parties were negotiating for settlement;

(2) plaintiff was a big multi-national corporation and heavily loaded with work and the plaintiff had to take final instructions from their head office in Kuala Lumpur.

The Judge had allowed the defendant's preliminary objection and had dismissed the application under O. 14 on this point. The Judge thereafter dismissed the application under O. 18 r. 19 and the plaintiff applied for further arguments in Open Court which was allowed.

Held:

[1] The Court did not accept the plaintiff's explanation for the delay in the filing of the application for judgment under O. 14 - this delay was inordinate and the plaintiff's said application is struck-off.

[2] Notwithstanding (1), delay is not fatal to an application under O. 18 r. 19.

[3] It is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19 and the powers conferred by this rule will only be exercised where the case is clearly beyond doubt that a claim or answer on the face of it is obviously unsustainable.

[4] The Court is satisfied that the plaintiff through their solicitors had sent several notices of demand to the defendant - as there is no evidence that these AR registered letters had been returned undelivered. The service must be presumed to be good and therefore there was proper demand made on the defendant.

[5] Distinguishing *United Prime Corporation Bhd. v. Q-Built Construction (M) Sdn. Bhd.*, the disparity in the sums stated as due and claimed is not fatal as there was nothing inconsistent with what contractually agreed in the contract.

[6] The guarantee was a continuing guarantee guaranteeing payments for goods already and to be supplied.

[7] As HE had agreed to be responsible for payment of all goods supplied to the companies, the defendant became liable under the terms of the guarantee to be responsible for the same.

[8] A guarantee should be considered simply like any other mercantile document or commercial contract - it should be given a reasonable business meaning and should not be construed so as to render it ineffective or illusory. It must be construed not only by the words used but also with regard to the surrounding circumstances.

[9] The defence discloses no reasonable defence and is therefore frivolous and vexatious and otherwise an abuse of the process of the Court.

[Application allowed.]

Cases referred to:

K & N Kenanga Sdn. Bhd. v. Latchman Dass s/o Shewaram [1986] CLJ (Rep) 388
Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd. [1986] CLJ (Rep) 170
Comptroller-General of Inland Revenue Malaysia v. Weng Lok Mining Co. Ltd. [1969] 2 MLJ 98
Tucker v. Collison [1886] 34 WR 354
Lim Yam Teck v. Lim Swee Chiang [1979] 1 MLJ 162
Tan Ah Yeo & Anor. v. Seow Teck Ming & Anor. [1989] 2 MLJ 3
United Prime Corporation Bhd. v. Q-Built Construction (M) Sdn. Bhd. & Ors. [1987] CLJ (Rep) 1048
Heng Cheng Swee v. Bangkok Bank Ltd. [1976] 1 MLJ 267
Perwira Habib Bank Malaysia Bhd. v. Fast Travel (M) Sdn. Bhd. & Ors. [1988] 3 MLJ 210
Lloyds v. Harper [1880] 16 Ch D 290
Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani [1985] CLJ (Rep) 41

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 18 rr. 9, 19

Other sources referred to:

The Supreme Court Practice 1988, p. 313, para. 18/19/2 & p. 661, para. 42/1/4

For the plaintiffs - Dr. Tunku Sofiah Jewa with her Dr. Yaacob Hussain Merican; M/s. Hj. Mohd. Noor, Dr. Yaacob & Ismail
For the defendant - Nadia Fong Tet Wun; M/s. Jayasuriya Kah & Co.

JUDGMENT

Mohd. Noor Ahmad J:

The plaintiffs came before this Court on an application under O. 18 r. 19 of the Rules of the High Court for the statement of defence to be struck out on the following grounds:

(a) it discloses no reasonable defence;

(b) it is scandalous, frivolous and vexatious;

(c) it is otherwise an abuse of the process of the Court;

and in the alternative, under O. 14 of the same Rules, for summary judgment for the sum of RM2,128,443.72 with service charges thereon at the rate of 1.5% per month from the date due to the date of payment and costs including the cost of the application. The argument was heard in open Court.

Before proceeding into the facts of the case and considering the merits of this application, let me dispose of two matters:

(1) One matter is concerned with a point taken up by the defendant's Counsel in her submission on a preliminary objection. She drew my attention to the delay on the part of the plaintiffs to make this application, which she said, citing *The Supreme Court Practice 1988*, p. 313, para. 18/19/2: "... should always be made promptly, and as a rule before the close of pleadings.", and in support thereof cited the case of *K & N Kenanga Sdn. Bhd. v. Latchman Dass s/o Shewaram* [1986] CLJ (Rep) 388 and quoted a passage from the judgment of Salleh Abas LP in the Supreme Court case of *Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd.* [1986] CLJ (Rep) 170 relating to the law as to the time when an application for an O. 14 judgment could be made. In the present case, the writ of summons was filed on 5 June 1987, memorandum of appearance and defence were filed on 16 June 1987, pleadings were closed on 30 June 1987, summons for directions was heard on 29 August 1988, and the present application was made only on 7 October 1988. Clearly there was a delay of nearly 16 months before the plaintiffs finally decided to apply to strike out the defence and/or for summary judgment under O. 14. However, the plaintiffs contended that the delay was justificable and not inordinate for the following reasons:

(i) the parties were still negotiating for settlement; and

(ii) the plaintiffs were a big multi-national corporation and heavily loaded with work and the plaintiffs had to take final instruction from their head office in Kuala Lumpur whether to proceed with the case or not, and the plaintiffs relied on the case of *Comptroller-General of Inland Revenue Malaysia v. Weng Lok Mining Co. Ltd.* [1969] 2 MLJ 98.

In the final analysis, the Court did not accept the explanation and held that the delay was inordinate for the purpose of O. 14 application and hence, dismissed the application under that order. However, the Court ordered the argument on the application under O. 18 r. 19 to proceed. In my opinion, the case of *K & N Kenanga Sdn. Bhd. v. Latchman Dass s/o Shewaram* [1986] CLJ (Rep) 388 and the passage from the judgment of Salleh Abas L.P. in *Krishnamurty's* case quoted therein have no application here (O. 18 r. 19 application) because

these cases are concerned with O. 14 application. Such a delay on the part of the plaintiffs would not have caused any injustice to either side except that had the substantive action been set down for hearing after the close of pleadings, the matter could have been litigated and disposed of much earlier. In the circumstances, the delay is not fatal as "the application may be made even after the pleadings are closed" per Brett, M.R. in *Tucker v. Collinson* [1886] 34 WR 354:

(2) The other matter is on the objection taken by the defendant's Counsel when the plaintiff's Counsel applied for further argument to be heard by the Court on his application under O. 18 r. 19 in respect of grounds (b) and (c). The application for further argument was based on the fact that as he was misled he did not have the opportunity to refer to affidavit evidence in his earlier argument in support of the said grounds. As there was merit in the application, it is only fair and just that I should hear him. Therefore, the defendant's Counsel's objection was overruled and further arguments were heard, and as a result of which my earlier order dismissing the plaintiff's application under O. 18 r. 19 with cost was reversed and judgment was entered for the plaintiffs. This would be tantamount to an alteration of my earlier judgment which, at that juncture, had not been entered and perfected. This procedure is not without precedent. A passage from *The Supreme Court Practice 1988* at p. 661, para. 42/1/4 reads as follows:

> A judgment takes effect from the time when the Judge pronounces it and the subsequent entry of it is mere form in obedience to the direction of the Court...but it is within the powers of a Judge to alter his judgment at any time before it is entered and perfected.

The same situation occurred in *Lim Yam Teck v. Lim Swee Chiang* [1979] 1 MLJ 162 and *Tan Ah Yen & Anor. v. Seow Teck Ming & Anor.* [1989] 2 MLJ 3.

The undisputed facts may be summarised as follows:

(1) Under a consumer contract (Ex. "KBL2") made between the plaintiffs and one Haskota Engineering Sdn. Bhd., (hereinafter referred to as "the HE") the plaintiffs agreed to supply Shell Petroleum products on credit to the HE and to various companies listed in Attachment I to the said consumer contract. In respect of purchases by the companies, orders would be placed by the respective companies directly on the plaintiffs and deliveries or collections would be made against the respective orders at point of placement of order with the original to the plaintiffs and a copy to the HE. For billing purposes, the invoices would be in the name of the company placing the order and addressed to the HE for payment. The HE would be responsible for the settlement of invoices in respect of purchases by the companies (per Attachment A to Ex. "KBL2", paras. 8 and 9).

(2) In consideration of the plaintiffs agreeing to supply the products on credit to the HE, the defendant agreed to be responsible to the plaintiffs on demand for the due payment of all such products not exceeding the sum of RM3,000,000. (per Ex. "KBL1").

(3) Pursuant thereto, the plaintiffs supplied the products from time to time to the HE and the various companies under the term of the said arrangement.

(4) Ultimately, the HE fell into arrears of payment in respect of the products supplied under the said arrangement and the plaintiffs are now claiming against the defendant under the said guarantee.

The defendant's Counsel contended that the following triable issues had been raised in the amended statement of defence:

(a) Was there a good notice of demand made on the defendant? (para. 3 of amended statement of defence);

(b) Was there consideration to support the guarantee, and/or was the consideration good, being a past consideration? (Paragraph 5 of amended statement of defence);

(c) Was the amount claimed incurred by the HE? (Paragraph 6 of amended statement of defence);

(d) What was the actual amount due, if any? Hence, she urged that the plaintiffs' application be dismissed with costs.

It is settled law that it is only in plain and obvious cases that recourse should be had to the summary process under this rule and the powers conferred by this rule will only be exercised where the case is clear beyond doubt that a claim or answer on the face of it is obviously unsustainable.

Now, I will deal with the issues allegedly to have been raised in the amended statement of defence:

1. With regard to issues (a) and (b), I am satisfied that the plaintiffs through their solicitors had sent several notices of demand by A.R. register to the defendant at his various addresses in Kota Kinabalu, Kuching and Kuala Lumpur and to the HE's address including his address as given in the letter of guarantee itself (per Ex. "KBL3" on pp. 30 to 36 of the bundle of documents). As there is no evidence that these A.R. registers had been returned undelivered the service must be presumed to be good and therefore, there was proper demand made by the plaintiffs upon the defendant. The amount claimed in the writ was RM2,161,807.82 and then reduced to RM2,156,372.90 in the amended statement of claim and finally reduced to RM2,128,443.72 in the present application, whereas in the letter of demand (Ex. "KBL3") a higher sum was stated, i.e., RM2,558,487.59 and in another letter of demand 5 June 1987 (p. 36 of the bundle of documents) a sum of RM2,161,807.82 was asked for. The defendant contended that the disparity had rendered the demand improper. The case of *United Prime Corporation Bhd. v. Q-Built Construction (M) Sdn. Bhd. & Ors.* [1987] CLJ (Rep) 1048 was cited in support thereof. My view is that, the said case is not applicable here. In that case, the amount stated in the letter of demand was inconsistent with what was constructually agreed under Article 17(1)(c) of the lease agreement. The lessor in that case was bound to demand for an amount in accordance with what was specified in that Article but did not. Instead, the lessor demanded for a lesser amount. It is on this ground that the Court in that case declined to allow the lessor to sign judgment against the lessee. In the present case, there is no similar clause in the consumer's contract. Therefore, the plaintiffs are at liberty to claim under the present application for a lesser amount and to go for trial on the balance.

2. As to issue (b), certainly there was consideration for the said guarantee, in that, the plaintiffs had agreed to supply and indeed had supplied the petroleum products on credit to the HE and the companies associated with the defendant's group of companies in Sabah (per Attachment I in Ex. "KBL2"). It transpired at the hearing that debts had already been incurred by the HE at the time when the letter of guarantee was signed and that the amount now claimed includes part of the debts. Be that as it may, the consideration is still good because the letter of guarantee clearly states that the guarantee is to be a continuing guarantee; in which case, it includes guaranteeing payments not only in respect of products supplied at the time of execution of the

guarantee but also products to be supplied in the future. (See *Heng Cheng Swee v. Bangkok Bank Ltd.* [1976] 1 MLJ 267 FC and *Perwira Habib Bank Malaysia Bhd. v. Fast Travel (M) Sdn. Bhd. & Ors.* [1988] 3 MLJ 210].

3.(i) In respect of issue (c), the defendant contended that the guarantee is merely towards the payments in respect of the petroleum products supplied on credit to the HE but not to the companies enumerated in para. 6 of the amended statement of defence. In short, the guarantee covers only the debts of the HE. Therefore, what the Court has to determine is whether the amounts claimed are the debts of the HE. For the purpose, the customer contract with its integral parts, i.e., Attachments I, II and III and the previous dealings between the parties in relation thereto must be considered. From the facts as stated in para. 3 above, it is evidently clear that under the consumer contract the HE was the only customer of the plaintiffs and that the HE would be responsible for the settlement of invoices in respect of purchases under the contract made by the companies associated with the defendant's group of companies in Sabah (per Attachment I). There was no other consumer contract between the plaintiffs and the companies, and the relevant purchases made by the companies had been made under the umbrella of the said consumer contract. The debts claimed is tabulated in Ex. "KBL10" (p. 126 of the bundle of documents) which is the summary of the statement of account as at 31 July 1987. It is pertinent to note that all the statements of account of the various companies were addressed to the HE for payments (p. 135 to p. 141 of the bundle of documents).

(ii) In the light of the foregoing, the Court is satisfied that the sums claimed are the debts incurred by the HE to the plaintiffs in respect of the petroleum products supplied by the plaintiffs during the relevant period to the HE and the various companies under the said consumer contract. That being the case, the said debts are covered by the guarantee. In coming to this conclusion, I direct my mind to the law relating to the construction of guarantee. A guarantee should be considered simply like any other mercantile document or commercial contract. Thus, it should be given a reasonable business meaning and should not be construed so as to render it ineffective or illusory. It must be construed reasonably not only by the words used, but also with regard to the surrounding circumstances. (Per Fry J in *Lloyds v. Harper* [1880] 16 Ch. D. 290 and *Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani* [1985] CLJ (Rep) 41).

In conclusion, I am satisfied that the defence discloses no reasonable defence, the proceedings are frivolous or vexatious and it is otherwise an abuse of the process of the Court. Therefore, the statement of defence is struck out and judgment is hereby entered against the defendant as follows:

(i) The sum of RM2,128,443.72;

(ii) Service charges thereon at the rate of 1.5% per month from the dates due to the date of judgment.

(iii) Interest of 8% per annum in respect of item (i) until satisfaction; and

(iv) Costs including costs of this application.

Also found at [1990] 1 CLJ 564